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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. 72-338

ROBERT CARROLL and WESTERN SURETY COMPANY,

Petitioners,

v.

STEVEN RAY McDANIEL, b/n/f and natural parent, KEITH McDANIEL; BENNY FRED JENKINS, and CONSTANCE BEVERLY HARBISON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 457 F.2d 968 (Appendix A of Petition). The unwritten opinion of the District Court is Appendix C of the Petition. The order denying the petition for rehearing is Appendix B of the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

1. Whether the Six Circuit Court of Appeals' decision holding a Sheriff, who stands in the position of a principal, vicariously liable for *punitive* damages of his agent-deputy, is in conflict with applicable decision of this Court and other U. S. Courts of Appeals?

2. Whether the Sixth Circuit Court of Appeals' decision holding a Sheriff, who stands in the position of a principal, vicariously liable for punitive damages of his agent-deputy, is in conflict with Amendment 7, 8, and 14 of the United States Constitution?

3. Whether the holding of the Court below that a Sheriff is liable vicariously for punitive damages for the act of his deputy, even though he did not participate in, authorize or ratify said act, is in conflict with applicable Tennessee law?

4. Whether the Sixth Circuit Court's approval of the District Court's action in entering a verdict assessing to the Sheriff the jury's judgment for punitive damages given against the deputy is in conflict with the verdict of the jury, is consistent with due process of law and is in conflict with decisions of this Court and other Federal Courts?

STATUTES AND RULES INVOLVED

The pertinent statutory provisions involved are 42 U.S. Code 1983, 1985, 1988, and are set forth in the petition as Appendix E at pp. 31-33.

STATEMENT OF THE CASE

The petition adequately sets forth the statement of the case with the exception of the petitioners' statement that overall supervision of proceedings was in the hands of Alcoa city officials. The facts show that the authority to serve a state warrant was vested in the deputy sheriff upon his arrival at the scene of the incident and that a city police officer had no jurisdiction or authority to serve a state warrant.

ARGUMENT

I. INTRODUCTION

The central theme of the petitioners' contention is that the sheriff and/or the surety on his official bond is not liable for the acts done by the deputy. It further appears that the doctrine of vicarious liability, according to the petitioners' theory, extends only to those damages which are actually compensatory and not those of the punitive nature. Taking petitioners' theory to its ultimate, it would then be concluded that all authority is vested in the sovereign, which is immune from suit and judgment. This logic is not followed by today's courts.

In the absence of legislation, specific in nature, granting immunity for specific acts, the courts hold that "when a tort is made possible only through the abuse of power granted by the government, then the government should be held accountable for the abuse whether it is negligent or intentional in character." *Carter v. Carlson*, 447 F.2d 358, 366 (C.A. D.C. 1971) (Cert. granted 404 U.S. 1014, appeal pending).

This Court in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 396;

91 S. Ct. 1999, 2004; 27 L. Ed. 2d 619, 626 (1971), citing *Bell v. Hood*, 327 U.S. at 684; 66 S. Ct. at 777; 9 L. Ed. 939 (1946) held that it is equally well settled "that where legal rights have been invaded, and a Federal statute provides for a general right to sue for such invasion, Federal courts may use any available remedy to make good the wrong done."

Petitioners' contentions appear to be based upon the rules laid down in *Monroe v. Pape*, 365 U.S. 187, 81 S. Ct. 173, 5 L. Ed. 492 (1961). The *Monroe v. Pape* case is only cited for its holding that Section 1983 does not authorize a suit for damages against a municipality which has been clothed in immunity by the parent state.

The petitioners' contentions further appear to attempt to impose the doctrine of principal and agent upon his relationship between the sheriff and his deputy, in essence the petitioners attempt to separate the sheriff from his alter ego or his shadow from himself.

Petitioners contend that there is conflict among applicable decisions of other United States Courts of Appeals. Respondents contend that the petitioners did not state the applicable law. "Deprivation of civil rights is not aimed at common law negligence, but of deprivation of rights secured by the Fourteenth Amendment." *Roberts v. Williams*, 456 F.2d 819, 825 (5th Cir. 1971). (Cert. denied, 404 U.S. 866, 92 S. Ct. 83, 30 L. Ed. 2d 110, 1971). Thus an act may be both a violation of state and federal common law and the remedies co-extensive, provided that local variations allowing diminution of amount of recovery are not imposed as provided in Federal common law. *Capercí v. Huntoon*, 379 F.2d 799 (1st Cir. 1968) (Cert. denied 393 U.S. 940, 1968).

Federal common law as applied by various Circuits is the same as Tennessee common law on the subject.

II. DECISION OF THE COURT OF APPEALS HOLDING THE SHERIFF VICARIOUSLY LIABLE FOR THE ACTS OF HIS DEPUTY IS NOT IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT AND OTHER U. S. COURTS OF APPEALS.

VICARIOUS LIABILITY UNDER FEDERAL DECISIONS

Carter v. Carlson, *supra*, page 369, states that the

"construction of Section 1983 finds additional support in a related statute, 42 U.S.C. Section 1988, also enacted by a Reconstruction Congress as part of the original Civil Rights legislation. Section 1988 provides:

"'(1) In all cases where (the laws of the United States) are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies ... the common law ... of the State wherein the Court having jurisdiction ... is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause ....'

"The Supreme Court has construed Section 1988 to incorporate into the federal civil rights laws state rules of liability insofar as they serve the policies of the federal statutes more effectively than federal rules of liability. *Sullivan v. Little Hunting Park*, 396 U.S. 229, 240, 90 S. Ct. 400, 24 L. Ed. 2d 386 (1969). If local law recognizes government liability where federal common law might not, then Section 1988 seems to

provide that the local rule shall govern in an action under Section 1983."

The Courts in *Hesselgesser v. Reilly*, 440 F.2d 901 (9th Cir. 1971), and *Roberts v. Williams*, *supra*, held that the sheriff is liable for the acts of his deputy even though the sheriff individually is ignorant of such actions. In *Whirl v. Kern*, 407 F.2d 781 (5th Cir. 1969), the Court held the sheriff and his sureties responsible for the acts of the deputy even though they were ignorant of the wrongful acts of the deputy and even though under Texas law, the sheriff was liable only if he ratified the acts of the deputy.

In *Rhoads v. Horvat*, 270 F. Supp. 307 (C.D. Colo. 1967), Eighth Circuit, held sheriff and deputy liable for both compensatory and punitive damages for violation of civil rights by false arrest.

III. DECISION OF THE COURT OF APPEALS HOLDING THE SHERIFF VICARIOUSLY LIABLE FOR THE ACTS OF HIS DEPUTY IS NOT IN CONFLICT WITH APPLICABLE DECISIONS OF TENNESSEE LAW.

VICARIOUS LIABILITY UNDER TENNESSEE DECISIONS

The District Court, in holding the sheriff and the bonding company liable for both compensatory and punitive damages, relied upon the Tennessee law which clearly holds such is proper. *Jones v. State*, 194 Tenn. 534, 252 S.W.2d 740 (1952); *State Ex. Rel. Harbin v. Dunn*, 39 Tenn. App. 109, 282 S.W.2d 203 (1943); *State Ex. Rel. Coffelt v. Hartford Accident and Indemnity Company*, 44 Tenn. App. 405, 314 S.W.2d 161 (1958); *Lazenby v. Universal Underwriters Insurance Company*, 214 Tenn. 639, 383 S.W.2d 1 (1964); and *Tennessee Code Annotated*,

Section 8-1920(3). This is the same as Federal common law. This holding is not in conflict with other Circuits. *Hesselgesser v. Reilly*, (9th Cir.) *supra*; *Roberts v. Williams*, (5th Cir.) *supra*; *Whirl v. Kern*, (5th Cir.) *supra*.

IV. THE DECISION OF THE COURT OF APPEALS HOLDING THE SHERIFF VICARIOUSLY LIABLE FOR BOTH COMPENSATORY AND PUNITIVE DAMAGES IS NOT IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT AND OTHER U. S. COURTS OF APPEALS.

VICARIOUS LIABILITY OF THE SHERIFF IMPOSING COMPENSATORY AND PUNITIVE DAMAGES UPON THE SURETY, UNDER FEDERAL LAW

"The view which we take of sheriff ... statutory responsibilities makes it necessary to hold that the ...., surety on the sheriff's bond, is also liable for the damages sustained by appellant Whirl. The general rule in Texas is ' ... in order to recover of the surety upon the official bond of the sheriff or constable for a trespass committed by him, it will be shown that the act was done in the performance of a duty legally imposed upon him by virtue of his office.'" *Whirl v. Kern*, *supra*, p. 796.

In *Hesselgesser v. Reilly*, *supra*, the Court allowed a recovery against the sheriff and the bonding company upon the premises that such a position of vicarious liability of the surety was not inconsistent with the Constitution and laws of the United States or under the laws of the State of Washington. Punitive damages are clearly authorized under Section 1983. *Caperci v. Huntoon*, *supra*; *Mansell v. Saunders*, 373 F.2d 573 (5th Cir. 1967); *Basista v. Weir*, 340 F.2d 74 (3rd Cir. 1965); *Hesselgesser v. Reilly*, *supra*; *Roberts v. Williams*, *supra*; *Whirl v.*

Kern, supra; *Jones v. Rundle*, 453 F.2d 147 (3rd Cir. 1971); *Sostre v. McGinnis*, 442 F.2d 178 (2nd Cir. 1971); *Guido v. City of Schenectady*, 404 F.2d 728 (2nd Cir. 1968).

V. THE DECISION OF THE COURT OF APPEALS HOLDING THE SHERIFF VICARIOUSLY LIABLE FOR BOTH COMPENSATORY AND PUNITIVE DAMAGES IS NOT IN CONFLICT WITH APPLICABLE TENNESSEE LAW.

VICARIOUS LIABILITY OF THE SHERIFF IMPOSING COMPENSATORY AND PUNITIVE DAMAGES UPON THE SURETY, UNDER TENNESSEE LAW

The Tennessee cases clearly hold that sureties of the sheriff are liable for both compensatory and punitive damages for acts done by the sheriff's deputy. *State Ex. Rel. Coffelt v. Hartford Accident and Indemnity Company*, *supra*, and *State Ex. Rel. Davis v. Hartman*, 306 F. Supp. 610 (E.D. Tenn. 1969). Tennessee law clearly authorizes that the deputy acts in lieu of the sheriff and in his name, representing the sheriff officially, and not as an agent, *Ivy v. Osborn*, 152 Tenn. 470, 279 S.W. 384 (1925) and that the surety of the sheriff is liable for compensatory as well as punitive damages for the acts of the deputy. *State Ex. Rel. Coffelt v. Hartford Accident and Indemnity Company*, *supra*, *State Ex. Rel. Davis v. Hartman*, *supra*, and *Gaston v. Gibson*, 328 F. Supp. 3 (E.D. Tenn. 1969).

VI. THE DISTRICT COURT AND COURT OF APPEALS CORRECTLY APPLIED RULE 51 OF THE FEDERAL RULES OF CIVIL PROCEDURE, WHICH CANNOT NOW BE RAISED IN QUESTION FOR THE FIRST TIME.

THE COURT'S INSTRUCTIONS TO THE JURY ON COMPENSATORY AND PUNITIVE DAMAGES

Rule 51 of the Federal Rules of Civil Rules of Civil Procedure states that no error as to a District Court's instruction to the jury can be assigned on appeal unless specific objection is raised prior to the jury's retiring. In this cause the District Court asked attorneys for both parties for objection to the charge and none were made. At least one Circuit Court of Appeals, the Ninth, requires strict application of this rule. *Brock v. United States*, 375 F.2d 479 (1969); *Crespo v. Fireman's Fund Indem. Co.*, 318 F.2d 174 (1963).

The Sixth Circuit has, however, been more liberal and has adopted an exception to Rule 51 for what is termed "plain error." *O'Brien v. Willis Motors, Inc.*, 385 F.2d 163 (1967) defines the test to be applied in determining whether or not to grant the exception. For the exception to apply the error must be both obvious and prejudicial. The test is taken from the United States Supreme Court as follows:

"In *United States v. Atkinson*, 297 U.S. 157, 160, 56 S. Ct. 391, 392, 80 L. Ed. 555, the Court said:

> 'In *exceptional* circumstances, especially in criminal cases, appellate courts, in the public interest may of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise *seriously* affect the fairness, integrity or public reputation of judicial proceedings.' 385 F.2d 163 at 166. (Emphasis added.)

Petitioners, not having raised question at trial, cannot now claim error.

On the facts which are not disputed and the apparent unanimity of the Circuits as to the prevailing law, the decision of the District Court and the Court below was manifestly correct. There appears to be no conflict of decision and no importation question of Federal law requiring decision of this Court.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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